Judicial Activism

Gravest Threat to Judicial Independence

AP PHOTO/JUDI BOTTONI

By James Bopp, Jr.

For litigants to obtain the justice to which they are entitled, judicial independence is vital. Increasingly that independence is threatened. In my view, the threat comes from judicial activism. However, some commentators on this issue consider judicial elections to be the biggest threat to that independence and have advocated steps to move away from elections. Short of that, they argue that judicial elections are so different that judicial campaigns can and should be severely limited. I believe that judicial elections are different. Despite the near unanimous opinions of state supreme courts, the American Bar Association, and the judicial

establishment that judicial elections are categorically different in such a way that the First Amendment does not have full application to them, this issue was settled by the United States Supreme Court in *Republican Party of Minnesota v. White,*[1] where it held that the states cannot prohibit judicial candidates from announcing their views on disputed legal and political issues. Moreover, the breadth of the *White* opinion now has been reflected in the decisions of

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three federal circuit courts and about a dozen federal district courts where an additional 12 judicial canons have been struck down as incompatible with the strict scrutiny that is required by the First Amendment under *White.*

I say, however, that judicial elections are different from elections for the legislative or executive branch because, unlike them, judges have a dual role. One role that judges share with the political branches is to make law, most notably in the development of the common law. In the exercise of their discretion, they also make law concerning the litigants before them. Sometimes, though, judges illegitimately make law when they impose their own personal views, through interpretations of statutes or constitutional provisions, in a way contrary to the original meaning of those laws.

Judges Have a Limited Role

More important, what makes judges different is that they are obligated to decide cases that come before them on the basis of the law and the facts of the particular case. Legislators and governors do not have to do that. They can ignore the law. They can remake the law by legislation or executive decree. And they can ignore the facts. Finally, they can pledge to do that during their campaigns. It is wrong, however, for judges to do that. It is a violation of their oath, a denial of one of the critical roles of a judge, to pledge or promise a certain result in a particular case or class of cases.

Thus, despite the fact that the United States Supreme Court has held that the state cannot prohibit legislative candidates from promising how they will deal with certain matters when elected, judges can be so forbidden. In the *White* case, I was taken to task for holding that position by Justice Anthony Kennedy in oral argument. But I believe that position passes constitutional muster and that it is a vital restriction on what judges can say in order to preserve the judicial role. Thus, in my view, judicial elections are different.

Nevertheless, I would disagree with many commentators on the cause of recent criticism of judges and what should be done about it. Let us first deal with the criticism. Criticism of the judiciary has been episodic throughout our history, and it is hard to justify the claim that such criticism is worse now than it has ever been. After all, we do not have sitting United States Supreme Court justices already impeached by the House and pending conviction before the Senate for essentially their opinions as judges. We do not have a president who is defying the Supreme Court or telling the Supreme Court to enforce their opinions if they can. We do not have a decision of the United States Supreme Court leading to the election of a president that then triggered a civil war in which hundreds of thousands of our fellow citizens died. We do not have a president urging the packing of the Court because he disagrees with its decisions. We do not have governors standing in the schoolhouse door, defying rulings of federal judges and asking the president to bring out the National Guard. If you look at historic criticism, it's really hard to top President Thomas Jefferson, who said in 1820: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a coordination of a general and special government to a general and supreme one alone."[2]

We should reflect on such criticisms as Justice Felix Frankfurter did in a famous and important case in this area, *Bridges v. State of California,* where he said: "Judges as persons, or courts as institutions, are entitled to no more immunity from criticism than other persons and institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties or fallibilities.... Judges must be kept mindful of their limitations and of their ultimate responsibility by a vigorous stream of criticism expressed with candor however blunt."[3]

That was Justice Frankfurter in dissent. The majority decision, written by Justice Hugo Black, pointed out that actually shielding judges from criticism would be counterproductive to the standing that the judiciary seeks in our society.

That takes us to efforts to limit the independence of the judiciary, which, I've already stated, is a wonderful gift, one vital to justice. However, the judiciary is given that gift because of its limited role. Because we also believe in popular sovereignty and democracy, the Founders of our Constitution described the judiciary as the least dangerous branch, because they understood that the limited role of the judiciary is to interpret and apply the law, not to exercise the authority of setting public policy for the country. The public policy–setting role resides in the political branches—that is, the legislative and executive branches. This constitutes a tradeoff: If you want judicial independence, which I believe is vital to the central role of a judge—interpreting and applying the law impartially—then judges will only have a modest role in the development of public policy. If you assume the opposite—that judges have a predominant role in setting public policy—you deny popular sovereignty, which is contrary to democracy.

Judges Can't Solve Society's Problems

Chief Justice John Roberts recently talked about this very point: that judicial activism threatens the independence of the judiciary. "Courts should not intrude," he said, "into areas of policy reserved by the Constitution to the political branches." And he explained that "judges should be constantly aware that their role, while important, is limited. They are not commissioned to solve society's problems, as they see them, but simply to decide cases before them according to the rule of

law. When the other branches of government exceed their constitutionally mandated limits, the courts can act to confine them to the proper bounds. It is judicial restraint, however, that confines judges to their proper constitutional responsibilities."

Justice Scalia has recently said this, in his own inimitable way: "We can talk about independence as if it is unquestionably and unqualifiedly a good thing. It may not be. It depends on what your courts are doing. . . . The more your courts become policy-makers, the less sense it makes to have them entirely independent." He concluded that "[w]hen [courts] leap into making [public policy], they make themselves politically controversial and that's what places their independence at risk."

Again, the problem is judicial activism. In 1977, then-Judge Lynn Compton criticized such a robust policy-making role for judges on the pages of the *Los Angeles Times:* "[Courts] are policy-making bodies. The policies they set have the effect of law because of the power those courts are given by the Constitution. . . . In short, these precedent-setting policy decisions were the product of the social, economic, and political philosophies of a majority of the justices who made up the court at any given time in history."[4]

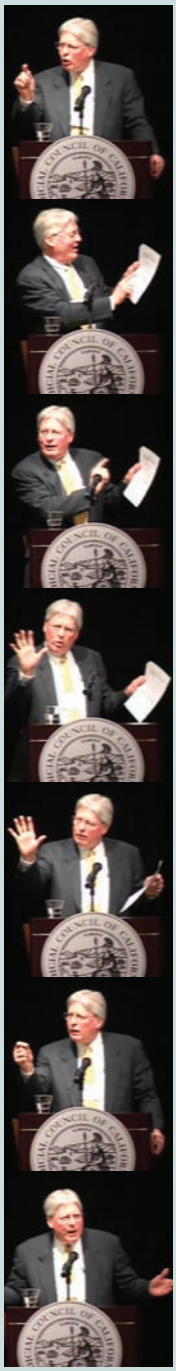
And Judge Pam Rymer of the Ninth Circuit has said about her own judicial activist colleagues, "My activist colleagues would probably say that the judge's primary role is to protect individual rights and to achieve social justice, that justice is the guiding principle of the judicial branch. And they would say they should view the Constitution as a set of very broad principles to be viewed in light of contemporary problems. In my own view, this kind of judicial philosophy leads a judge . . . to behave more like a legislator than like a judge."

So, if we believe in popular sovereignty, if we believe in democracy, and if we believe that the public policy role is one that the People should consent to, then judges, if they want a more robust role in setting public policy, must expect to be less independent and more accountable to the People. Indeed, it is a grave offense to interpret the Constitution, to add rights that were not present in that Constitution when it was ratified by the People. And it is a grave offense to write out of the Constitution rights that have been in that Constitution when it was consented to by the People. They have chosen to limit the government and to guarantee rights in certain ways.

We have had instances of judicial activism. *Dred Scott, Plessy v. Ferguson, Wickard v. Filburn, Roe v. Wade, Lawrence v. Texas, Kelo v. City of New London,* and *McConnell v. FEC* are just a few that have added or undermined rights or other provisions in the Constitution. For instance, political speech is at the core of the First Amendment's mandate that Congress should "make no law" and nude dancing is at best at its periphery, but if you look at the regulation of these two First Amendment rights, you see that political candidates are required by law to run under their real names and you can't hardly get the real name of a nude dancer. Political contributions are limited, but you can give as much money as you want to a nude dancer. Political candidates cannot give quid pro quos, but nude dancers do. Political candidates must put a disclaimer on their advertising, whereas the United States Supreme Court, in a 5–4 decision, said that a state could require pasties and a G-string on a nude dancer, but that's rarely enough material on which to put a disclaimer.

Judicial Activism Undermines Public Support

Many people in surveying the Court's decisions on abortion, pornography, and sexual conduct generally have concluded that the courts have imposed a whole new culture on our country through those decisions and this is the essence of judicial activism. Most troubling to me is that the majority of the people of the United States believe that judges base their decisions on their own personal beliefs as opposed to applying the law. That takes us to the problem: judicial activism undermines public support for an independent judiciary. It also gives rise to efforts, some ridiculous and misbegotten, others firmly in the Constitution, to make judges more accountable and less independent.



James Bopp, Jr., makes his points while speaking at the Summit of Judicial Leaders.

Our response cannot be simply to deny that there is judicial activism or to say that we do not know what it is. Some people say that judicial activism is just a decision one does not agree with or that judicial activism is striking down a law or reversing a precedent. If that were true, one could determine whether a judge is an activist by simply adding up how many laws he or she has struck down or precedents he or she has voted to reverse. But all of those denials assume that the Constitution has no real meaning, that there's nothing in there, that nothing is actually ascertainable that limits government or imposes standards on the judiciary when deciding cases. But of course that is not true; the Constitution is considerably more than that.

So we have judicial elections, and 75 percent of the people in the United States believe that it is through elections that we are most likely to get judges who are fair and impartial. (Only 18 percent said that the appointment process results in judges who are more fair and impartial.) The People want fair and impartial judges, and elections are how they believe they can get them.

The retention election of California Chief Justice Rose Bird in 1986 is a good example of the appropriate use of an election system to throw out a judge

who was essentially imposing her own personal views contrary to the law. In 100 percent of 58 or 61 or 64—I've seen each of these numbers—cases where the death penalty had been imposed, she voted to reverse. Even so, as one commentator observed, when she ran in her retention election, she emphasized in her campaign that judicial independence requires judges to set aside their personal views concerning the issues before the court. And there is no evidence to indicate that voters disagreed with Chief Justice Bird's view. To the contrary, they clearly felt that the Chief Justice and her two colleagues *had* interjected their personal views into these decisions, and, as a result, turned them out of office.

Those who want to get to the core of attacks on judicial independence, which have serious consequences for the conduct of the appropriate business of the judiciary, need to focus on the question of whether judges are restrained and what it means to restrain the exercise of judicial power. That is the root of the problem. That is why people are concerned about the judiciary.

The solution to this problem, in my view, is judicial restraint. CR

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Notes

1. (2002) 536 U.S. 765.

2. Jefferson to Thomas Ritchie, Dec. 25, 1820, *The Writings of Thomas Jefferson,* vol. 10, ed. P. L. Ford (1899).

3. (1941) 314 U.S. 252.

4. Letter to Editor, *Los Angeles Times,* Feb. 20, 1977.

SUMMIT OF JUDICIAL LEADERS • NOVEMBER 2006

Urgency Before Emergency

During the Judicial Council–sponsored Summit of Judicial Leaders in November, the dominant theme was protecting judicial independence against politicization. But another critical theme was protecting the courts against disasters, ranging from fires to floods to terrorist attacks.

As Tamara Lynn Beard, executive officer of the Superior Court of Fresno County, succinctly put it: "We're playing Russian roulette every day we're not prepared."

The session "Urgency Before Emergency: Disaster Planning and Recovery" was carefully designed to prepare judges and court executives for whatever challenges might lie ahead after a disaster or emergency strikes.

One of the speakers was Dr. Hugh Collins, judicial administrator of the Louisiana Supreme Court, whose resources were taxed to the limit last year when Hurricane Katrina struck and the levees failed, flooding courthouses, jails, law offices, police evidence rooms, and even the homes of judges. Collins advised courts to have emergency plans ready, be prepared to improvise on them, and prioritize the systems and operations that need to restart immediately and those that can wait.

"Believe an emergency will happen during your career," he cautioned. "And be ready to commit resources for the long haul."

On September 11, 2001, after two planes commandeered by terrorists destroyed the World Trade Center in New York City, court leaders there managed to keep the courts open until 3 p.m.

"However, at that point in the day, as the full scope of the catastrophe set in, we believed it was most important for our employees to be home with their families to deal with the traumatic impact of that terrible day," recalled Judge Jonathan Lippman, chief administrative judge of the New York State Courts. New York City courts were closed the next day, and court officials used television, radio, and the Internet to communicate with the public and other court personnel. "Remarkably, it was our universal experience that jurors appeared for duty in great numbers no matter what the instructions, very much viewing jury service as a patriotic duty in that time of crisis," he said.

In California, Malcolm Franklin, senior manager of Emergency Response and Security for the Administrative Office of the Courts, reported that his office is developing a Web-based continuity-of-operations planning system in collaboration with the Superior Court of Fresno County. A new emergency planner has just joined the AOC's Southern Regional Office in Burbank, he said, and templates for a basic disaster plan are being developed.

Ask yourself and answer these questions, Franklin said: "If there was an emergency, where are your kids right now? What are your families doing right now? Do you have a plan for you and your court? If you don't have a plan, you're not prepared.

"Expect the unexpected—get ready for anything and everything," Franklin advised.